Supreme Court, U.S.
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No. 94-1284

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANDREW C. KURINSKY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether state statutes of limitations apply to claims made pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. If state statutes of limitations apply to *Bivens* claims, whether the court of appeals correctly held that the two-year limitation period provided by Ohio Revised Code § 2305.10 (1991) for "[a]n action for bodily injury or injuring personal property" applies to petitioners' claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 33 F.3d 594. The opinion of the district court (Pet. App. A17-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1994. Petitions for rehearing were denied on November 1, 1994. Pet. App. A34-A35. The petition for a writ of certiorari was filed on

January 27, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a federal investigation into suspected wire fraud and other criminal violations by petitioner Andrew Kurinsky. The Kurinsky family owns and operates a business that manufactures, repairs, and distributes cable television and other electronic equipment. Pet. App. A2-A3. The FBI suspected petitioner Andrew Kurinsky of committing wire fraud in violation of 18 U.S.C. 1343, and of modifying and distributing cable equipment in violation of 47 U.S.C. 553(*a*)(2), which prohibits the sale of equipment intended to promote the unauthorized reception of cable services. On March 29, 1989, the FBI searched petitioners' business premises pursuant to a valid search warrant and seized cable and other electronic equipment, computers, documents, and handguns. The government returned the seized material between April, 1989, and August, 1990. See Pet. App. A3.

On October 29, 1992, petitioners filed suit against the United States and twelve individual FBI agents for damages arising out of the search. Pet. App. A3, A17. They alleged that the United States had negligently damaged their property and had deprived them of their property without due process in violation of the Fifth Amendment. They also sought damages against the individual federal agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), contending that the agents had violated their Fourth and Fifth Amendment rights in the conduct of the search. See Pet. 8, 9.

The district court dismissed the *Bivens* claims against the individual defendants as time-barred. Pet. App. A29-A31.[1] The district court followed the Sixth Circuit's decision in *Friedman* v. *Estate of Presser*, 929 F.2d 1151, 1158-1159 (1991), in which the court of appeals held that the relevant statute of limitations for *Bivens* actions in Ohio is the two-year limitation period in Ohio Revised Code § 2305.10 (1991), the limitation period also applicable to damages actions brought against state actors under 42 U.S.C. 1983. Pet. App. A30.

The court of appeals affirmed the dismissal of the *Bivens* claims. Pet. App. A13-A16. The court observed that, in prior decisions, it had held that *Bivens* actions should be governed by the same statute of limitations as applies to actions under 42 U.S.C. 1983, and that the two-year period in Ohio Revised Code § 2305.10 (1991) governs actions under 42 U.S.C. 1983. Pet. App. A13-A14. Thus, the court held, "it follows, as this court recently observed in *Friedman* * * * [that] the relevant Ohio statute of limitations for *Bivens* actions is two years." *Id.* at A14.

In both the district court and the court of appeals, petitioners urged application of the four-year limitation period in Ohio Revised Code § 2305.09 (1991), and contended that Ohio state appellate courts had

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[1] The district court also dismissed petitioners' claims against the United States. Pet. App. A28. The court of appeals subsequently reversed the dismissal of the claims based on negligence, which were brought under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (see Pet. App. A12-A13), but affirmed the dismissal of the claim based on the Due Process Clause itself (see *id.* at A13). Petitioners do not renew their due process claim against the United States in this Court.

applied that four-year period to actions under 42 U.S.C. 1983. The court of appeals nevertheless found its prior decisions to be controlling and indicated that petitioners' recourse was to seek en banc review. Pet. App. A14-A15. The court also rejected petitioners' argument for application of the four-year limitation period in 28 U.S.C. 1658 (Supp. V 1993) for "civil action[s] arising under an Act of Congress enacted after the date of the enactment of this section [December 1, 1990]," holding that Section 1658 plainly does not encompass *Bivens* actions. Pet. App. A15-A16. The court subsequently denied petitioners' request for rehearing en banc. *Id.* at A34-A35.

ARGUMENT

The court of appeals correctly concluded that petitioners' *Bivens* actions should be governed by the state statute of limitations applicable to actions under 42 U.S.C. 1983. That conclusion is consistent with the decisions of every court of appeals that has addressed statutes of limitations for *Bivens* actions. The court also employed the correct analysis in concluding that the applicable state statute of limitations was Ohio Revised Code § 2305.10 (1991).

1. Petitioners allege a cause of action for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which "established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right," *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). Neither the Constitution nor any federal statute specifies a limitation period for *Bivens* actions, and the Court has never determined what stat-

utes of limitations apply to such actions. The Court has, however, addressed the appropriate statute of limitations to apply to constitutional claims against state actors under 42 U.S.C. 1983, which also lacks an express limitation period. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), the Court noted that a lack of an express statute of limitations is "a void which is commonplace in federal statutory law," *id.* at 266, and observed that the "settled practice" in such situations "has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so," *id.* at 266-267. The Court thus directed lower courts to borrow the most analogous limitation period under state law, the statute of limitations for personal injury actions. *Id.* at 276-280; see *Owens* v. *Okure*, 488 U.S. 235, 249 (1989); see also *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 661-662 (1987) (same for actions under 42 U.S.C. 1981).

As the Ninth Circuit has observed, "[a]ctions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*." *Van Strum* v. *Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); see also *Bieneman* v. *Chicago*, 864 F.2d 463, 469 (7th Cir. 1988), cert. denied, 490 U.S. 1080 (1989). Both *Bivens* actions and Section 1983 actions are designed to provide redress for constitutional violations, and the same immunity standards apply in both kinds of actions. *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978). In light of those similarities, every court of appeals that has considered the issue has concluded that the statute of limitations for claims brought under 42 U.S.C. 1983 applies also to *Bivens* claims. See *McSurely* v. *Hutchison*, 823 F.2d 1002,

1005-1006 (6th Cir. 1987), cert. denied, 485 U.S. 934 (1988); *Van Strum* v. *Lawn*, 940 F.2d at 410; *Bieneman* v. *Chicago*, 864 F.2d at 469-470; *Chin* v. *Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987).

Petitioners argue (Pet. 12-13) that state statutes of limitations apply to Section 1983 actions only by virtue of 42 U.S.C. 1988 (1988 & Supp. V 1993), which directs the courts to apply, to civil rights cases, "the common law, as modified and changed by the constitution and statutes of the State * * *, so far as the same is not inconsistent with the Constitution and laws of the United States." Petitioners reason that, because the *Bivens* remedy is judicially created rather than statutory, the directive of Section 1988 does not apply. Pet. 13. In *Wilson* v. *Garcia*, however, the Court indicated that Section 1988 only confirmed that the "settled practice" of borrowing statutes of limitations from state law should apply to civil rights cases as well. 471 U.S. at 266-267 & n.12; see also *Owens* v. *Okure*, 488 U.S. at 239 (Section 1988 "endorses" the borrowing of state-law limitations provisions). The courts of appeals have also agreed that the decision in *Wilson* "d[id] not depend on § 1988. Nothing in the text or history of that statute speaks to the questio[n]." *Bieneman* v. *Chicago*, 864 F.2d at 469; see also *Van Strum* v. *Lawn*, 940 F.2d at 409 (*Wilson* rested "on the *imputation* of purposes to the 1871 Congress that enacted §§ 1983 and 1988 based on practical concerns about judicial administration of that statute").

Petitioners invoke concerns about the need for uniformity in the *Bivens* remedy, which is a creation of federal law, and they rely on *Carlson* v. *Green*, 446 U.S. 14, 23-25 (1980), in which the Court concluded that a uniform federal rule of survival for

Bivens actions was necessary "for complete vindication of constitutional rights," *id.* at 24. See Pet. 15-17. Nothing in *Carlson*, however, is inconsistent with the borrowing of state statutes of limitations. In *Carlson*, it was alleged that the plaintiff's decedent died as a result of unconstitutional actions by federal prison officials. 446 U.S. at 16. Had the cause of action not survived the victim's death, there would have been no remedy for the deprivation of constitutional rights. In such a situation, it was clear that a state survivorship law abating a cause of action on the death of the victim would be inconsistent with federal policy. See *id.* at 24; cf. *Wilson* v. *Garcia*, 471 U.S. at 266-267 (state law should be borrowed to fill federal gap where "it is not inconsistent with federal law or policy to do so"). *Carlson* did not mandate uniform rules to govern all aspects of *Bivens* litigation; indeed, it expressly left open whether federal law should incorporate state rules on other survivorship issues for *Bivens* claims. 446 U.S. at 25 n.11.

The federal interest in uniformity and certainty of statutes of limitations for *Bivens* actions is adequately served by the courts' practice of borrowing only one statute of limitations for each State. See *Wilson*, 471 U.S. at 272, 275. That practice ensures that every plaintiff bringing a *Bivens* action within a particular State will know the applicable limitation period. In *Bivens* actions, as under Section 1983, "the need for national uniformity 'has not been held to warrant the displacement of state statutes of limitations,' " *Wilson*, 471 U.S. at 275, and the federal interest in avoiding unnecessary litigation over a time bar supports the practice of borrowing one, and only one, statute of limitations for each State. Con-

gruence among Section 1983 and *Bivens* actions on the limitation issue also makes it "an uncomplicated task for judges, lawyers, and litigants [to ascertain the proper statute], rather than a source of uncertainty, and unproductive and ever-increasing litigation." *Ibid.*

Finally, petitioners rely (Pet. 13) on 28 U.S.C. 1658 (Supp. V 1993), which provides that "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." By its own terms, 28 U.S.C. 1658 has no application to *Bivens* actions, which do not arise under an Act of Congress. Petitioners argue, however, that Section 1658 represents a "national policy" in favor of a four-year limitations period for federal actions that otherwise lack a statute of limitations. *Ibid.* But when Congress enacted Section 1658 in 1990, it was well aware of the existence of *Bivens* actions and of the courts' well settled practice of borrowing state statutes of limitations for such actions. Congress could have easily directed that *Bivens* actions be governed by Section 1658, had it desired that result. Instead, it left undisturbed the practice of borrowing state law unless that law is inconsistent with federal law or policy.

2. Petitioners argue (Pet. 18-28) that, even if the same state statute of limitations applies to both Section 1983 and *Bivens* actions, the courts below applied the wrong statute of limitations. In *Owens* v. *Okure*, this Court held that, where state law provides multiple statutes of limitations for personal injury actions, courts should borrow the state's general or residual statute of limitations for personal injuries. 488 U.S. at 249-250. The Court characterized a gen-

eral provision as one "which applies to all personal injury actions with certain specific exceptions," *id.* at 246, and a residual provision as one "which applies to all actions not specifically provided for, including personal injury actions." *Id.* at 246-247.

Thus, *Owens* v. *Okure* mandates that courts select the state statute of limitations that, of those available, best fits within the category of general or residual statutes of limitations for personal injuries. That determination will necessarily vary from State to State, depending on the wording of state statutes. In 1989, the Sixth Circuit, sitting en banc, concluded that the appropriate limitations period for Section 1983 claims is found in Ohio Revised Code § 2305.10 (1991), which provides that "[a]n action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." *Browning* v. *Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989).[2]

Petitioners argue (Pet. 21-22) that the appropriate statute of limitations is in fact the four-year limitations period in Ohio Revised Code § 2305.09 (D) (1991), "[f]or an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12 * * * of the Revised Code." The Sixth Circuit has concluded, however,

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[2] Contrary to petitioners' contentions (Pet. 22-24), *Van Strum* v. *Lawn*, 940 F.2d 406 (9th Cir. 1991), *Lounsbury* v. *Jeffries*, 25 F.3d 131 (2d Cir. 1994), and *Gray* v. *Lacke*, 885 F.2d 399 (7th Cir. 1989), cert. denied, 494 U.S. 1029 (1990), do not conflict with *Browning* or the decision below. In each case, the statute of limitations was chosen from the array of possible state-law provisions, in light of the interpretations placed on them by the court of appeals. The courts of appeals all recognize that *Wilson* and *Owens* require reference to the residual or general statute of limitations for personal injuries.

that Section 2305.09(D) does not provide the appropriate limitation period, reasoning that that section is not a residual *personal injury* statute of limitations, but rather a residual, or catch-all, statute of limitations applicable to all causes of action not otherwise covered by a statute of limitations. See *McSurely* v. *Hutchison*, 823 F.2d at 1005-1006; *Mulligan* v. *Hazard*, 777 F.2d 340, 343 n.4 (6th Cir. 1985), cert. denied, 476 U.S. 1174 (1986), overruled on other grounds, *Browning* v. *Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc).[3] This Court has specifically disapproved the use of such a catch-all limitation period unless it embraces, "either explicitly or by judicial construction, unspecified personal injury actions," *Owens*, 488 U.S. at 250 n.12; *Wilson*, 471 U.S. at 278, as the Sixth Circuit recognized in *Mulligan*, *supra*.

Petitioners note (Pet. 24-27), that some Ohio state courts have characterized Section 2305.09(D) as the State's general or residual personal injury statute of limitations and have applied that statute of limitations to state-court actions brought under 42 U.S.C. 1983.[4] As this Court made clear in *Wilson* v. *Garcia*,

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[3] In *Mulligan*, the Sixth Circuit applied Ohio's one-year statute of limitations for intentional torts, Ohio Rev. Code § 2305.11 (1991), to a Section 1983 action. That choice was disapproved by *Owens* v. *Okure*, which rejected the analogy of intentional torts for Section 1983 cases. 488 U.S. at 242-244. The remainder of the *Mulligan* court's reasoning, that the catch-all statute of limitations should not be borrowed, survived *Owens*, and indeed was reaffirmed in it.

[4] The Ohio Court of Appeals for Franklin County concluded in *Weethee* v. *Boso*, 582 N.E.2d 19, 21 (1989), motion to certify the record overruled, 550 N.E.2d 482 (Ohio 1990), that the four-year period in Section 2305.09(D), was appli-

however, the appropriate limitation period for Section 1983 actions, even if borrowed from state law, "is ultimately a question of federal law." 471 U.S. at 269-270. "Even when principles of state law are borrowed to assist in the enforcement of this federal remedy, the state rule is adopted as 'a federal rule responsive to the need whenever a federal right is impaired.'" *Id.* at 269; see also *Gray* v. *Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (declining to adopt statute of limitations applied by Wisconsin state courts to Section 1983 actions).

In concluding that Section 2305.10 was the appropriate statute of limitations for Section 1983 and *Bivens* actions, the Sixth Circuit faithfully applied this Court's precedents in *Wilson* and *Owens*. If the Sixth Circuit has erred in selecting Ohio's residual personal injury statute of limitations through application of those precedents, that error raises no issue of general importance calling for this Court's review.[5]

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cable to a Section 1983 claim. The Court of Appeals for Trumbull County arrived at the same conclusion in *Bojac Corporation* v. *Kutevac*, 581 N.E.2d 625, 627 (1990), as did the Court of Appeals for Marion County in *Martin* v. *Adult Parole Authority*, No. 9-93-45 (Mar. 4, 1994), motion to certify the record overruled, 635 N.E.2d 43 (Ohio 1994). The Ohio Supreme Court has not ruled on the issue, although in *Yaklevich* v. *Kemp, Schaeffer & Rowe Co.*, 626 N.E.2d 115, 120 (Ohio 1994), it held that the four-year period in Section 2305.09(D) was applicable to the tort of abuse of process.

[5] Petitioners cannot claim to have been surprised by the lower courts' decisions that their claim was time-barred. The Sixth Circuit decided on July 24, 1987, in *McSurely*, 823 F.2d at 1005, that the statutes of limitations for Section 1983 actions and *Bivens* actions are the same. It decided on March 16, 1989, in *Browning*, 869 F.2d at 992, that the limitation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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period in Ohio for Section 1983 claims was two years. Both of those cases were decided before the date of the search in this case, March 29, 1989.

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